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No. 85-1982

In The
Supreme Court of the United States
October Term, 1985

CHASE RIVELAND, Executive Director,
Colorado Department of Corrections,

Petitioner,

v.

RICHARD LEE BALL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE

THE STATE OF IDAHO, JOINED BY ARIZONA, CONNECTICUT, DELAWARE, HAWAII, INDIANA, LOUISIANA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH DAKOTA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA and WISCONSIN

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QUESTIONS PRESENTED

May federal circuit courts circumvent the exhaustion requirement in habeas corpus cases, inject new issues, and deny a state an opportunity to present evidence and argument thereon, by merely citing a case which the parties had cited for a totally different proposition?

What type of infirmity renders a conviction so unreliable that it may not be used in a subsequent proceeding to enhance punishment?

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rules 36.1 and 36.4 the above-listed states, through their Attorneys General, file this brief in support of the Petition for Writ of Certiorari filed by the Director of Corrections of the State of Colorado in *Riveland v. Ball,* No. 85-1982 (1985).

This case presents issues of importance to the criminal justice system of every state, involving as it does a belated collateral attack upon a twenty-eight-year-old conviction.

Respondent Ball is a state prisoner who petitioned successfully for a federal writ of habeas corpus. At sixteen years of age, Ball was convicted of robbery. That conviction was subsequently proffered in the present case, where respondent Ball was again convicted of robbery and, as an habitual criminal, sentenced to life imprisonment. The Tenth Circuit Court of Appeals affirmed the district court's order granting habeas relief. However, the Court of Appeals upheld the lower court by deciding an issue not addressed by the state court, the district court, or either of the parties. The court held that respondent's right to counsel and his parents' right to notice of the charges against him were unconstitutionally violated. *Ball v. Ricketts*, 779 F.2d 578 (10th Cir. 1985). The consequence of this conclusion was that the earlier robbery conviction was found to be an invalid predicate for the sentence enhancement imposed on Ball. To reach its holding the Court of Appeals held that *In Re Gault*, 387 U.S. 1 (1967), applied retroactively.

This case raises an issue central to the effective administration of state criminal justice systems. The limits set by this Court on the appropriate scope of federal review and supervision of state criminal proceedings will determine the extent to which limited state resources must be allocated to the process of federal collateral review. Every state has a strong interest in the way this Court reacts to Court of Appeals decisions expanding access to federal habeas courts.

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STATEMENT

The Amici adopt and incorporate by reference the statement of facts set forth in the Director's Petition for a Writ of Certiorari.

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SUMMARY OF ARGUMENT

The Court of Appeals held that the district court's order granting habeas relief would be affirmed. However, the court affirmed on grounds independent of those upon which the district court granted the petition. The Court of Appeals held (1) that *Gault* applied retroactively and thus respondent's parents' right to notice was violated, and (2) that the invalid conviction was improperly used to sentence Ball as an habitual criminal.

The following special and important reasons exist for granting a writ of certiorari:

a. The decision below conflicts with decisions of other Courts of Appeals and state courts of last resort.

b. The decision below has so far departed from the accepted and usual course of judicial proceedings that the circumstances call for an exercise of this Court's power of supervision.

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REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Decisions of Other Courts of Appeals and State Courts of Last Resort.

This Court has not yet decided the question of prospective or retroactive application of *Gault*. The court below applied *Gault* retroactively to a conviction now twenty-eight years old.

The circuits are divided on the question. The Fourth, Eighth, Ninth, and Tenth Circuits have applied *Gault* retroactively. *Kemplen v. State of Maryland*, 428 F.2d 169 (4th Cir. 1970); *United States v. Slipka*, 735 F.2d 1064 (8th Cir. 1984); *Powell v. Hocker*, 453 F.2d 652 (9th Cir. 1971); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968). The Third and District of Columbia Circuits have held that *Gault* does not necessarily apply retroactively. *See, United States ex rel. Diggs v. Commonwealth of Pennsylvania*, 457 F.2d 933 (3rd Cir. 1972); *Mordecai v. United States*, 421 F.2d 1133 (D.C. Cir. 1969).

In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court held that the right to have illegally seized evidence suppressed did not apply retrospectively. The Court's decision was the result of balancing the advantages and disadvantages of applying a newly developed principle to previously final judgments:

> The accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. . . . [T]he Constitution neither prohibits nor requires retrospective effect. . . . [W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. 381 U.S. at 628, 629.

The states are also divided. Arizona, California, Florida, Kentucky, Maryland, and Virginia have applied *Gault* prospectively. Indiana, Massachusetts, New Jersey, and Wisconsin have applied *Gault* retroactively. It is evident that in the absence of a clear mandate from the United States Supreme Court, this confusion will continue.

In *Stovall v. Denno,* 388 U.S. 293, 297 (1967), the Court established three criteria for evaluating retroactivity issues: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Considering these criteria, the Court held that the right to counsel during confrontation for identification purposes applied prospectively. 388 U.S. at 300. Although the Court acknowledged that past injustices could have been averted by the presence of counsel, especially strong countervailing interests prohibited retrospective application. The administration of criminal laws would have been disrupted and states would have been required to void the convictions of every person not represented by counsel during an identification procedure. The same concerns apply in the present case.

The purpose of *Gault* was to insure fair and judicious resolution of charges against juveniles. Retroactive application will not measurably advance this purpose. First, many past proceedings were accurate. Second, dissipation of memories, evidence, and witnesses would obstruct rather

than promote more accurate findings, even with notice and assistance of counsel.

The reliance factor of *Stovall* militates strongly against retroactivity. The pre-*Gault* juvenile system functioned in the posture of *parens patriae,* intentionally putting aside the technicalities of the criminal process that necessitate assistance of counsel.

The effect of the Court of Appeals' decision on the administration of justice would be entirely adverse. Likely, most proceedings before *Gault* violated some if not all of the *Gault* proscriptions. Thus, numerous decisions would be voided and the time and energy necessary to reopen cases for purposes of collateral attack would disserve the public interest and would further burden overcrowded court calendars. *See, e.g., Brumley v. Charles R. Denney Juvenile Center,* 466 P.2d 481 (Wash. 1970). Because retroactive application of a newly announced constitutional rule depends in part on the effect of the rule on the integrity of the truthfinding function in the trial court, *see, e.g. Stovall v. Denno, supra,* the decision of the Court of Appeals leaves a large logical gap. The Court of Appeals acknowledged that the right of notice at issue was that of Ball's parents:

> . . . the right of the parents to receive adequate notice is one of the rights that should be extended retroactively to cases such as the one before us. 779 F.2d at 581.

The decision of the Court of Appeals confers upon Ball an entitlement to habeas relief for the violation of a "right" that was not his own. In *Gault,* the Court explained that the notice requirement was intended to protect "a youth's

freedom and his *parents' right to his custody.*" 387 U.S. at 34. [Emphasis added.] Ball clearly had notice of the charges against him. Assuming that his parents did not have notice in time to protect the right to custody, this circumstance centers on an issue different from and entirely collateral to the issue of whether the truthfinding function of the trial court proceeding was compromised by the lack of notice to Ball's parents. It seems plain the decision of the Court of Appeals has no capacity to correct any conceivable defect in the factfinding processes entrusted to trial courts. For this reason there was no warrant to apply the principles of *Gault* to Ball's case, which occurred ten years prior.

Although the decision in *Gault* was retroactively applied, the new procedural rules it requires are foreign to juvenile court practices. *Gault* is substantially more revolutionary and far reaching than *Miranda v. Arizona,* 384 U.S. 436 (1966), which this Court held applicable prospectively in *Johnson v. New Jersey,* 384 U.S. 719 (1966). This Court in holding that *Miranda* applied prospectively explained: "*Miranda* . . . encompass[es] situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." 384 U.S. at 730. Other protections for the integrity of the truthfinding process exist and were afforded respondent in the conviction of which he complained. In such cases the Court has consistently applied new constitutional interpretations prospectively only. The right to counsel at preliminary hearings is not retroactive. *Adams v. Illinois,* 405 U.S. 278 (1972). The right to counsel under *Boykin v. Alabama,* 395 U.S. 238 (1969). is not retroactively applied. *Hart v. Risley,* 772 F.2d 911 (9th Cir. 1985). Moreover, the con-

cept of assistance of counsel is substantially different in the traditionally informal atmosphere of juvenile proceedings than in a criminal trial. *Brumley, supra.*

II. The Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings by Its Sua Sponte Holding That Gault Applies Retroactively That Its Decision Calls for an Exercise of This Court's Power of Supervision.

It has been settled for a century that exhaustion of state remedies is a prerequisite to federal habeas corpus. As a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act. *Ex Parte Royall,* 117 U.S. 241 (1886). *See* 28 U.S.C. § 2254. The exhaustion doctrine furthers the policy of comity. Adhering to this policy minimizes federal interference and disruption of state judicial proceedings. "It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Rose v. Lundy,* 455 U.S. 509, 518 (1982).

28 U.S.C. § 2254(d) commands that the federal habeas court presume the state courts determined the facts correctly. This Court has held that federal review is of limited scope. *Sumner v. Mata,* 449 U.S. 539 (1981). By injecting new legal issues, the court below has deprived the state courts of a full and fair opportunity to litigate and decide the question.

In *Picard v. Connor,* 404 U.S. 270 (1971), this Court explained that it is not sufficient that a federal habeas

corpus applicant has been through the state courts. In *Picard,* the Court of Appeals, acknowledging that the defendant had not attacked his conviction on equal protection grounds, nonetheless held that the defendant had been denied equal protection of the laws. This Court found that the state courts could not be faulted for failing to consider a claim not asserted by the parties and held that the substance of the federal habeas corpus claim must first be presented to the state courts. *Ball* presents a comparable situation. Though both parties cited *Gault* in their briefs, no argument was presented in state court that *Gault* should be retroactively applied. Respondent's assertions were that his guilty plea was involuntary and that his waiver of counsel was ineffective. The record is devoid of any contentions about *Gault* rights or violations.

This Court has required "the federal courts to show a high measure of deference to the factfindings made by the state courts." 455 U.S. at 598.

The fundamental interest underlying the exhaustion doctrine and the related policy of federal-state comity is prevention of needless, unnecessary and time-consuming, piece-meal litigation. The court below itself noted: "It is important to emphasize the limited scope of federal court review here." 779 F.2d at 579. It is unfortunate that the Court of Appeals honored this principle only in the breach of it.

The result reached by the court below is inconsistent with the clear mandate of the Act and irreconcilable with this Court's decisions requiring exhaustion. The Colorado courts were denied an opportunity to consider the unexhausted issues on which the decision of the Court of Ap-

peals turned. As the petitioner's brief points out, had the federal courts honored the exhaustion rule it would probably have become clear that there was no factual basis for Ball's argument that his parents had no actual notice of his incarceration. Federal collateral review based on incorrect assumptions of fact, incomplete facts or no facts cannot be expected to be of any public benefit. The Court has appropriately pointed out that the exhaustion requirement encourages collateral review based on a full factual record. *Rose v. Lundy,* 455 U.S. 509 (1982). The Court should insist that the lower federal courts follow the rule.

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CONCLUSION

This case affords this Court an opportunity to resolve a significant conflict.

The Court of Appeals' expansion of the availability of the writ of habeas corpus in federal courts is unnecessary and an unwarranted expansion of this Court's decisions. It lays the groundwork for greater and costlier intrusions into the law enforcement functions of state courts. Public confidence in the ability of both the federal and state judicial systems to uphold the law is undermined by the perception that criminal judgments entered in state courts are rarely final. Yet the extensive opportunities for federal collateral review result in relief in only the rarest cases, suggesting that much of such review is wasted effort. The conflict between state and federal institutions, intrinsic in the process of federal collateral review, is magnified by the failure of federal courts to give proper weight

to the rule requiring exhaustion of state remedies before federal relief may be pursued.

Respectfully submitted,

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